No. 96147

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In The Supreme Court Of The United States

OCTOBER TERM, 1996

FREDERICK L. MASTAW,

Petitioner,

v.

NORFOLK & WESTERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the sudden failure of the train brake system causing the train to go into an unintended emergency and stopping the train when the train brake system was not engaged by the crew constitute a violation of the Federal Safety Appliance Act as a matter of law.

(2) Should the jury have been instructed that Norfolk & Western violated the Safety Appliance Act when a train line hose failed to function during the train movement causing an undesired emergency stop even though Norfolk & Western had inspected the train brake system before departure and found no defects.

PARTIES TO THE PROCEEDING

The names of all parties are listed in the caption and style of the case.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

FREDERICK L. MASTAW
Petitioner,

v.

NORFOLK & WESTERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

REPORTS OF OPINIONS BELOW

The Opinion of the trial court was not officially reported but is reported in the Appendix at pages 2 - 9.

The Opinion of the Supreme Court of Virginia denying Mastaw's Petition for Appeal and Affirming the Decision of the Trial Court has not been officially reported and is reported in the Appendix at pages 1 - 2.

GROUNDS FOR JURISDICTION

1. Your Petitioner is seeking to review the Supreme Court of Virginia's decision of December 17, 1996 denying Mastaw's Petition for Appeal and thereby affirming the decision of the trial court.

2. Your Petitioner asserts that the Supreme Court has jurisdiction pursuant to §28 U.S.C. 1257.

STATUTE INVOLVED

Federal Safety Appliance Act

1. Driving-wheel brakes and appliances for operating train-brake system.

From and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for the purpose.

9. Power or train brakes; operation by engineer; rules for installation, inspection, maintenance and repair.

Whenever, as provided in said Act [45 USCS §§ 1 - 7], any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act [45 USCS §§ 1 - 7], the Interstate-Commerce Commission [Secretary of Transportation] may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid. [One hundred and twenty days after the date of enactment of the Power or Train Brakes Safety Appliance Act of 1958, the Interstate Commerce Commission shall adopt and put into effect] the rules, standards, and instructions of the Association of American Railroads, adopted in 1925 and revised in 1933, 1934, 1941 and 1953, which such revisions as may have been adopted prior to the enactment of such Act [enacted Apr. 11, 1958], for the installation, inspection, maintenance, and repair of all power or train brakes for common carriers engaged in interstate commerce by railroad. [Such rules, standards, and instructions shall [thereafter] remain the rules,

standards and instructions for the installation, inspection, maintenance and repair of all power or train brakes unless changed, after hearing, by order of the Interstate Commerce Commission [Secretary of Transportation]: Provided, however, That such rules or standards or instructions or changes therein shall be promulgated solely for the purpose of achieving safety. The provisions and requirements of this section shall apply to all trains, locomotives, tenders, cars, and similar vehicles used, hauled, or permitted to be used or hauled, by any railroad engaged in interstate commerce. In the execution of this section, the Interstate Commerce Commission [Secretary of Transportation] may utilize the services of the Association of American Railroads, and may avail itself of the advice and assistance of any department, commission, or board of the United States Government, and of State governments, but no official or employee of the United States shall receive any additional compensation for such service except as now permitted by law. Failure to comply with any rule, regulation or requirement promulgated by the Interstate Commerce Commission [Secretary of Transportation] pursuant to the provision of this section shall be subject to the like penalty as failure to comply with any requirement of this section.

STATEMENT OF THE CASE

On August 28, 1991 Mastaw reported to work train number 427 with Voelker as the engineer and Wills as the brakeman at Crewe, Virginia. Train number 427 was a mixed time freight with approximately 90 cars with 2 engines and a caboose.

In accordance with Norfolk & Western's policy and Federal regulations, car inspectors performed a brake test on the train before departure to make sure the air brake system was working properly. The engineer operating the train put 90 pounds of air pressure into the train line system. The train line system had to hold the pressure and then the engineer applied the brakes to the entire train. The car inspector then inspected each car to make sure there was not any leakage, that the hoses were in good condition, and that the brakes are applied on each car. After the car inspector reported to the engineer that the inspection was satisfactory, the engineer released the air in the system and the car inspector walked back

along the train again to make sure the brakes were released.

The crew, including the engineer and the conductor would rely on the results of the inspection by the carmen and would not make their own independent inspection. Mastaw reported that the carmen did make the brake inspection and that the brake system was reported to be in good working order.

Upon receiving the car inspector's report that the train passed the brake test and that the air brake system was working properly, Mastaw's crew left Crewe headed in a westerly direction with the 90 car mixed freight train towards Roanoke, Virginia. Mastaw was riding the lead unit and Wills was riding in the second unit. Voelker was operating the lead unit. Several hours later, when the train reached the Possum Creek trestle, Wills and Mastaw heard an exhaust of air and the train went into sudden emergency because of the application of the brake system. Voelker, the engineer, did not apply the

brakes. Wills noticed that the air pressure gauge went to zero. The crew knew there was trouble because the train went into the emergency without the engineer applying the brakes. According to Mastaw, the train stopped with the lead unit just having cleared the west end of the Possum Creek trestle.

Rule 102 of the Norfolk & Western Operating Rules set out the duties and responsibilities of the crew when there is an undesired emergency stop. There was a dispute as to what Mastaw was to do after notifying the dispatcher of the emergency stop. Norfolk & Western maintained that Mastaw did not have to walk the train to inspect for brake defect or if he did, that Mastaw could have used an alternative route different from the one he chose since the route selected by Mastaw required him to descend and ascend rough and steep terrain. Mastaw claimed that he was complying with Rule 102 and that it was his obligation and job to walk the train to inspect and find out what was wrong with the brake system and he had

to use the route he chose to properly inspect for a brake defect.

Mastaw injured his back during this inspection while ascending a steep hill. Mastaw, with his injured back, and Wills continued their inspection of the cars until they came to the 70th car which was an automobile rack car. At this time, Wills and Mastaw both heard air escaping and noticed the train line was broken. According to Wills, the brakeman, and Pugh, an expert who had investigative experience with the National Highway Transportation Board, the broken train line was a part of the braking system and caused the train to go into emergency. Wills reported the metal, threaded part of the air hose was damaged because of a crack and could not be fixed by the crew. The uncontradicted evidence showed that the train went into an undesired or unexpected emergency stop because of a defect in the train line or air brake system. Mastaw and Wills could not repair the defect.

Miller, the general supervisor of car repair for Norfolk & Western, verified that Norfolk & Western

replaced a broken flexible train line hose on the flat car that was leaking air and had been observed by both Mastaw and Wills. Unfortunately the broken flexible train line hose was not available for inspection because it had been destroyed by Norfolk & Western. However, the repair record of Norfolk & Western did show that a broken flexible train line hose was replaced. There was no indication on the repair record as to what caused the break or where the break was. Norfolk & Western's own supervisors admitted that the flexible train line hose replaced was a part of the air brake and train line system and are safety appliances.

Ronald Henry, superintendent of airbrakes for Norfolk Southern Corporation agreed that a hose failure would cause the system to lose air, that the train will then go into emergency and that this was a failure of the brake line system. Pugh, an expert who formerly worked for the National Highway Transportation Board, explained that an undesired emergency is a brake failure caused by a failure in the train line system.

After the flexible train line hose was replaced by carmen from Lynchburg, the train movement continued to Roanoke. Mastaw's claim was for his injuries he sustained while ascending a steep hill trying to inspect the train to see where the brake defect was located.

There was a dispute throughout the trial about the meaning of the Safety Appliance Act. Norfolk & Western early in the proceedings tried to dismiss Mastaw's claim under the Safety Appliance Act by moving for summary judgment. The Court refused this motion and stated "if the proof in this case is sufficient to deduce the brake failure on the defendant's train was a violation of the Safety Appliance Act, then I at that time would have no problem, assuming the evidence comes out that way, in finding a per se violation on the part of the defendant". (Appendix, page 24, 25) However, the trial court did not follow this reasoning during the instruction phase of the trial.

Later, Norfolk & Western moved the trial court to strike Mastaw's evidence as to a violation of a Safety Appliance Act. The Court refused to do so but

would not rule that Norfolk & Western violated the Safety Appliance Act as a matter of law. (Appendix, page 38, 39)

During the presentation of instructions, Mastaw asked the Court to grant Instruction 40. Instruction 40 provided:

> "The Court instructs the jury that the defendant violated the Federal Safety Appliance Act as a matter of law. If you find from a preponderance of evidence that this violation contributed, in whole or in part, to cause the injuries to Frederick L. Mastaw, this was a violation of the Federal Employee Liability Act, then you shall find your verdict for the plaintiff." (Appendix, page 43, 44)

The Court after argument and objection by Mastaw refused to grant Instruction 40. See Final Judgment Order, where Mastaw's objections to Instruction 40 are stated in detail. (Appendix, page 10)

Although initially refusing instruction 40 and telling Mastaw that this instruction was not granted, the Court mistakenly marked granted on instruction 40

so this instruction was not in the refused instructions when Mastaw made his initial objections to the instructions refused by the Court. Before the instructions were read to the jury, Mastaw's counsel noticed the error of the trial court, and inquired to the Court, wasn't there an error in marking granted on Instruction 40. The trial court recognized that Instruction number 40 should not have been marked granted and then marked denied on Instruction 40. (Appendix page 41 - 43) The Court therefore, over the objection of Mastaw, did not grant Instruction 40 and Instruction 40 was not given to the jury. (Appendix page 41 - 43)

The jury then returned a verdict for Norfolk & Western (Appendix, page 15 - 17) Mastaw then moved for a new trial (Appendix, page 17 - 18) and filed a written motion for a new trial and argued it was error for the trial court to have refused Instruction 40 and that the trial court should have held that Norfolk & Western violated the Safety Appliance Act as a matter of law. (Appendix page 19 - 20) The trial court

overruled Mastaw's motion for a new trial and adopted Norfolk & Western's argument to support its reasoning that Instruction 40 was not a proper statement of the law. (Appendix page 2 - 9) Mastaw then appealed this decision to the Supreme Court of Virginia and assigned as error the failure of Trial Court to grant Instruction 40 and to hold as a matter of law that Norfolk & Western violated the Safety Appliance Act. (Appendix, page 20)

The Supreme Court of Virginia in review of this assignment of error in Mastaw's Petition for Appeal found no error and denied Mastaw's Petition for Appeal and affirmed the decision of the Trial Court. (Appendix, page 1, 2)

ARGUMENT AND REASONS FOR GRANTING WRIT

The evidence is uncontradicted that Norfolk & Western violated the Safety Appliance Act and as a result the Court should have instructed the jury that Norfolk & Western violated the Safety Appliance Act. Mastaw does not argue that Norfolk & Western's

violation of the Safety Appliance Act was a matter of law a cause of his injury. The decision of the trial court which was affirmed by the Supreme Court of Virginia is contrary to the established judicial precedents of this Court and other federal and state courts and is in conflict with the intent and meaning of the Safety Appliance Act enacted by Congress.

The Norfolk & Western repair records indicate that a broken flexible train line air hose was replaced where the air was leaking on the car picked out by Wills and Mastaw. Ronald Henry, superintendent of Air Bakes for Norfolk Southern Corporation, who was familiar with the rules and regulations that govern braking systems and power brakes, agreed that when there is a broken hose, the system loses air and the brakes will apply. Henry agreed that if air escaped from a broken line and the brakes applied, this was a failure of the brake system. Mastaw and Wills both heard the air go out right before the train went into emergency and Wills observed the pressure gauge at zero. Voelker, the engineer, did not apply the brakes.

All agree that the train went into an undesired or unexpected emergency which is a stop that is not intended and is a brake failure. Mastaw and Wills found the defective part, a damaged train line hose and coupling housing with the air leaking and indicated this was the cause of the train going into emergency. The air brake system worked after repairing the broken train line hose. Pugh, an expert in air brakes, confirmed that the defective part was a part of the air brake system and that there was a violation of the Safety Appliance Act and a failure of the air brake system.

Mastaw states that when reviewing the evidence and the inferences from the evidence along with the law of the Federal Safety Appliance Act and the decisions interpreting it, that it is clear that Norfolk & Western violated the Federal Safety Appliance Act as a matter of law and that it was error to submit to the jury the issue of whether Norfolk & Western violated the Safety Appliance Act. Mastaw agrees that the issue of causation, that is whether Mastaw's injury

resulted from a violation of the Act was for the jury, but the issue of violation was not.

The Statutory Liability (referring to the Safety Appliance Act) is not based upon the carrier's negligence. "The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous." See Brady Terminal R. Assoc., 303 U.S. 10, 15, 58 S.Ct. 426, 82 L.Ed. 614, 618 (1938); see Myers v. Reading Co., 331 U.S. 477, 482, 67 S.Ct. 1334, 91 L.Ed. 1615 (1947). Mastaw did not have to prove negligence in reference to his claim under the Safety Appliance Act. See Myers, 331 U.S. at 483.

There are two recognized methods of showing a defective brake

> "Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function when operated with due care in the normal, natural and usual manner."

See Myers, 331 U.S. at 483. See also Richmond F. & P. R. Co. v. Brooks, 197 F.2d 404 (D.C. 1952) applying this same standard to the operation of the train brake systems.

In Coray v. Southern Pacific Co., 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 210 (1949) a train unexpectedly stopped because air brake lines escaped because the threads on a valve were so badly worn, the nut became disconnected. This Court held that there was a violation of the Safety Appliance Act. This Court, as a matter of law, recognized that the brakes were defective and this was the reason for the sudden stop. The Court in interpreting the Safety Appliance Act held that "it commands railroads not to run trains with defective brakes." ...

> "In this case, where undisputed evidence established that the train suddenly stopped because of defective air brake appliances, petitioner was entitled to recover if this defective equipment was the sole or a contributory proximate cause of this decedent's employee's death."

See Coray, 331 U.S. at 523. The Court went on to hold that

> "Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has demanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages."

See Coray, 335 U.S. at 524.

Where liability is predicated on failure to comply with the requirements of the Safety Appliance Act, negligence does not have to be proved. Compliance with the Act is an absolute duty and cannot be satisfied by the exercise of reasonable care. If it appears that the appliance was defective or failed to function properly, then the employee has met his burden. See Byler v. Wabash R. Co., 196 F.2d 9, (8th Cir. 1952). The Supreme Court of Virginia has recognized that his is the law under the Safety Appliance Act by stating there is absolute liability on proof of defective or inefficient safety equipment. See N & W Ry. Co. v. Keatly, 211 Va. 507 (1971) but did

not follow it here. Once a violation is established, only causal relation is an issue. See Carter v. Atlanta St A.B. R. Co., 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236, 241 (1949). See also New York, New Haven & Hartford R. Co. v. Leary, 204 F.2d 46 (1st Cir. 1953) where the Court held that air brakes are controlled by the Safety Appliance Act. In Leary, a train stopped on a trestle because of a defective air hose. The plaintiff, a conductor, went to find out what the cause was and found a broken air hose and later fell off the trestle, injuring himself. The Court went on to hold that the undisputed evidence established that the train suddenly stopped because of a defective air brake and that the railroad employee was entitled to recover if the defective equipment was a cause of his injury. The Court held that the railroad violated the Act as a matter of law and stated the only issue of causation was for the jury.

> "Defective brakes create a number of hazards, depending on the circumstances under which they operate. The danger is not confined merely to the likelihood that

> a sudden stop or the failure to stop might produce a collision or a severe jolt." ..
>
> "A sudden stop in the night exposed the employees to other hazards. Among those hazards are bad weather, faulty road beds, an unperceived trestle." See Leary at 466.

In O'Donnell v. Elgin, Joliet & E.R. Co., 338 U.S. 384, 394, 70 S.Ct. 200, 94 L.Ed. 187 (1950), the plaintiff offered an instruction that the braking of a coupler was negligence per se but this was denied. On appeal, this Court held it was error to refuse this instruction.

> "As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a pre-emptory instruction that to equip a car with a coupler which broke in a switching operation was in violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and neither evidence of negligence nor of diligence and care was to be considered on the question of this liability."

See O'Donnell, 338 U.S. at 395, 94 L.Ed. at 194.

Norfolk & Western's argument that there was not a violation of the Safety Appliance Act because Mastaw failed to produce sufficient evidence to convince a jury that there was either a brake defect or the air brake failed to function when operated with due care is not valid and without evidentiary support. It does not matter that the train brake system was inspected before departure and was in operating condition as the Safety Appliance Act is a strict liability statute and Mastaw does not have to show negligence in inspection or negligence in maintenance or care. There was no probative evidence that an animal carcass, a stray bullet or other cause punctured the hose and the test in any event is the performance of the appliance. Norfolk & Western destroyed the hose and the hose was not available for any inspection. Norfolk & Western was operating a train with defective brakes, which defect caused the train movement to suddenly go into emergency and come to an emergency stop. The argument of Norfolk & Western that the brake system worked as it was

designed to work - namely, to go into emergency if air escaped, is disingenuous. Here there was no application of its brakes and the brakes were not designed to go into emergency without a brake application. If the argument and position of Norfolk & Western is correct and which argument was accepted by the Trial Court and the Supreme Court of Virginia, then there would be a defense to any brake failure by saying that the brake stopped the train by allowing the air to escape and therefore there was no brake failure. The decision of the Supreme Court of Virginia and the Trial Court is contrary to the law of the Safety Appliance Act and the decisions of this Court and other federal and state courts. Mastaw proved a violation of the act and the court should have granted Instruction 40. The Supreme Court of Virginia and the trial court are requiring Mastaw to prove a case beyond the established law and case decisions.

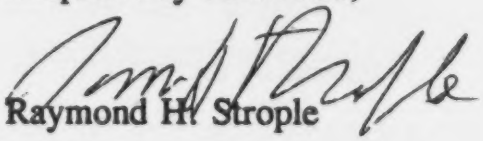
CONCLUSION

The evidence is clear that there was a brake defect, namely, the flexible hose had to be replaced

and the brakes failed to operate properly since the train went into emergency without the train brake system being applied. There was a violation of the Safety Appliance Act.

This Court should grant this Petition for Certiorari because the Supreme Court of Virginia and the Trial Court have not followed the decisions of this Court and other federal courts applying the Federal Safety Appliance Act thereby restricting the remedy of railroad employees under the Federal Employers Liability Act which incorporates the terms of the Federal Safety Appliance Act.

Respectfully submitted,



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OPINION OF THE SUPREME
COURT OF VIRGINIA

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 17th *day of* December, 1996.

Frederick L. Mastaw, Appellant,

against Record No. 961528

Circuit Court No. CL92-001169

Norfolk & Western Railway Company, Appellee.

From the Circuit Court of the City of Roanoke

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the

judgment complained of. Accordingly, the Court refuses the petition for appeal.

A copy, Teste: David B. Beach, Clerk

By Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF
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v.
NORFOLK & WESTERN RAILWAY COMPANY

COURT'S OPINION

March 15, 1996

Gentlemen:

I have reviewed the plaintiff's Motion for a new trial and the authorities cited by each of you. I find the defendant's memorandum and the arguments contained therein to be persuasive. The plaintiff's motion for a new trial is denied. The defendant's memorandum is adopted as the Court's opinion.

Mr. Hagie should prepare the necessary order.

Robert P. Doherty, Jr.

Judge

VIRGINIA: IN THE CIRCUIT COURT OF
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DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A NEW TRIAL WHICH WAS INCORPORATED BY REFERENCE IN COURT'S OPINION

II. THERE WAS NO ERROR IN FAILING TO INSTRUCT THE JURY THAT THE DEFENDANT VIOLATED THE FEDERAL SAFETY APPLIANCE ACT AS A MATTER OF LAW

It was entirely proper for this Court to refuse to give an instruction that, as a matter of law, NW violated the FSAA. Federal case law which governs actions brought under the Federal Safety Appliance Act clearly indicates that the question of a violation was, at best, a jury question -- a question on which the jury found in favor of NW.

NW agrees that under Myers v. Reading Co., 331 U.S. 477, 483, 91 L.Ed. 1615 (1947), plaintiff

could prove a violation of the FSAA by showing either a particular defect in the air brake system or by showing a failure of the air brakes to function when operated with due care in the normal, natural and usual manner. Plaintiff failed to produce sufficient evidence to convince a jury that either of these two conditions existed, and he certainly did not have evidence that either of these conditions existed as a matter of law.

The evidence in the record was that the train's brakes operated without any problem prior to the emergency application of the brakes. When the air pressure was lost due to some unknown occurrence, the emergency braking system was triggered, as it was designed to do, and the train came to a stop. Thereafter, the train was not operated until the brakes were repaired.

Although a repair bill indicated that a flexible hose was replaced, no one recalled exactly what was wrong with the hose. In fact, plaintiff testified that the air loss was not from the flexible hose at all. Rather, he alleged that there was a broken metal air line which

the mechanics had to weld. (Mastaw 110-111 Exhibit E) Defendant convincingly disproved this allegation by showing that there was no welding equipment present at the scene. (Hughes 44; Exhibit F)

Thus, there was nothing beyond pure speculation to suggest that anything was wrong with air brakes prior to the trip, that there was a defect in the brakes or that an inspection negligently failed to reveal any problems. Evidence showed that any number of things could have happened to cause a flexible air hose to be replaced -- a rock or stick that flew up and punctured the hose, a stray bullet, or an animal carcass.

During pre-trial argument, plaintiff cited Grogg v. Missouri Pacific Railroad Co., 841 F.2d 210 (8th Cir. 1988), a similar case from the Eighth Circuit Court of Appeals, to defeat defendant's Motion for Summary Judgment on the Safety Appliance Act Violation. In Grogg, the plaintiff brought a FSAA claim alleging she was injured when the train on which she was the engineer went into an emergency stop.

Her evidence was that the train braked unexpectedly when an air hose failed to remain attached to its train car. The head brakemen testified that the air hose "had been busted. * * * It had been torn completely off the car." Id. at 213. No one knew the cause of the air hose failure.

The Court held that the trial court erred when directing a verdict for the railroad, but said a jury question was created:

> These facts would allow the jury to find that the air hose failed to function "in the normal, natural and usual manner" because it separated from the car at a time when it should not have done so. * * * Missouri Pacific's theories concerning more remote causes of the hose failure are theories the jury could choose to believe or not, and viewing the evidence as we must in Grogg's favor, these theories are more appropriately presented in closing argument.

Id. (emphasis added)(citations omitted).

Significantly, the Grogg Court ruled that the issue was a jury question and on remand did not direct

that the trial court should hold that the FSAA was violated as a matter of law. The case at hand is similar -- it was for the jury to sort out the conflicting evidence and decide whether the FSAA was violated. Understandably, plaintiff has not mentioned this case in his post-trial arguments.

In several of the other cases cited by the plaintiff, the courts also held that a jury question was created regarding a FSAA violation. For example, in New York, New Haven & Hartford Railroad Co. v. Leary, 204 F.2d 461, 462 (1st Cir. 1953), it was admitted that the train went into emergency because of a defective air hose. Nevertheless, the Court stated

> Having determined that the existence of a defective air brake in this case was all that plaintiff had to show in order to submit the violation of the [FSAA] to the jury, we must next consider whether the evidence warranted submission of the case to the jury on the issue of so-called legal causation.

Id. at 465 (emphasis added); see also, Myers, 331 U.S. at 440 (holding that evidence that the hand brake

failed to work when the hand brake failed to work when engaged by the plaintiff was sufficient to create a jury question whether the brake worked efficiently when operated with due care in the normal, natural, and usual manner); Metcalfe v. Atchison, Topeka and Santa Fey Ry. Co., 491 F.2d 892, 897 (10th Cir. 1974) (holding jury question existed whether misaligned drawbar violated FSAA).

The case at hand created a classic jury question. No one could recall what specific repairs were made or the reasons therefor. The jury was rightfully the final arbiter between the theories of the plaintiff and defendant.

In any event, the mere fact that a train goes into emergency does not mean that the brake system is in violation of the FSAA. The FSAA prohibits operating a train with defective air brakes. Prior to the emergency stop, the air brakes were operating as required. Once the brakes failed, for whatever reason, the train stopped and was not moved until efficient brake service was restored. Plaintiff's FSAA claim

merely relies on the fact that the train went into emergency. This is insufficient to establish a FSAA violation.

Finally, plaintiff is correct that a violation of the FSAA is negligence per se. However, he first must prove that the railroad violated the FSAA, Crane v. Cedar Rapids & I.C.R. Co., 395 U.S. 164, 1966 (1969), something which he did not do in this case. And, even if the jury found that there was a violation of the FSAA, it easily could have returned a verdict for NW by determining that plaintiff's decision to traverse the area under the trestle was the sole cause of his alleged injuries Emig v. Erie Lackawanna Ry. Co., 350 F. Supp. 986, 987 (W.D.Pa. 1972):

> Even under the Safety Appliance Act, where the defect in a particular appliance is negligence per se, the fact that an employee chooses a dangerous or risky manner in which to remedy the defect and consequently suffer [sic] injury does not impose liability on the employer.

Id. at 988; Beimert v. Burlington Northern, Inc., 726 F.2d 412, 414 (8th Cir. 1984).

ORDER ENTERING JUDGMENT FOR NORFOLK & WESTERN WHICH ORDER SETS OUT MASTAW'S OBJECTION TO INSTRUCTION 40

Entered April 30, 1996

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

FREDERICK L. MASTAW,
PLAINTIFF,
v. LAW NO. CL92-001169
NORFOLK & WESTERN RAILWAY COMPANY,
DEFENDANT.

ORDER

This proceeding came on for trial on August 28, 1995; present were the plaintiff, Frederick L. Mastaw and counsel, the defendant, Norfolk and Western Railway Company, and counsel, and a jury, including Tracey T. Wilson, Steve W. Reich, Rosemary N. Widener, Clarence E. Hill, Emily R. Johnson, Jerry A. Gillespie and Robert H. Clark, who were selected according to law and sworn to well and truly try the

issues joined and a true verdict render according to the law and the evidence. Because, in the opinion of the Court and the parties, the trial was likely to be protracted, two alternate jurors, Elaine M. Nelson and Traci M. Harmon, also were duly sworn, after having been selected in the manner prescribed by Code of Virginia §8.01-360; the jurors and alternate were administered their oath simultaneously, and the nine members of the jury panel were not advised which of them were jurors and which were the alternate jurors.

The proceeding was heard and tried on five (5) days, August 28, 29, 30, 31 and September 1, 1995.

The plaintiff's evidence was presented, following which the plaintiff rested; and thereafter, the defendant, by counsel, moved to strike the plaintiff's economic evidence, evidence of emotional damage and Safety Appliance Act claim. The motions were argued by counsel, after which the Court overruled the defendant's motions, to which ruling the defendant, by counsel, duly excepted.

The defendant's evidence was presented, following which the defendant rested. After the conclusion of all the evidence, the defendant renewed its motion to strike plaintiff's evidence, and after consideration of the evidence and argument of counsel, the Court again denied the defendant's motion, to which the defendant, by counsel duly excepted.

Thereupon, out of the presence of the jury, the Court granted and denied the parties' requests for instructions to the jury for the reasons set forth in the record including the Court's refusal to grant Instruction No. 40 that instructed the jury that the defendant violated the Federal Safety Appliance Act as a matter of law. Plaintiff presented Instruction No. 40, dealing with the defendant violating the Safety Appliance Act as a mater of law to the Court with argument and authorities in chambers, and after hearing defendant's objection and reviewing authorities from both sides, the Court, over plaintiff's objections because the plaintiff maintained that it was a proper statement of law based on the evidence, orally refused to grant

Instruction No. 40. Subsequently, in preparing the instructions to be read to the jury, the Court misfiled Instruction No. 40 and Instruction No. 40 was included with the granted instructions at the time the parties placed their objections on the record. After the parties recorded their objections, but before the instructions were read to the jury, the misfiling of Instruction No. 40 was discovered and it was removed from the list of granted instructions, as reflected in the trial transcript of September 1, 1995 at pages 27 and 28.

After the jury heard and received the Court's instructions and heard the argument of counsel, the alternate jurors were excused. The jury then retired to its jury room to consider its verdict, and after some time, the jury returned to the Courtroom and on a special verdict form, signed by Steve Reich, foreperson, answered "no" to the following two questions:

1. In regard to plaintiff's Safety Appliance Act claim, we, the jury, find, based on a preponderance of the evidence, that the defendant violated the Safety Appliance

Act, and that such violation caused, in whole or in part, plaintiff's injury.

Yes _____ No__X__

2. In regard to plaintiff's FELA claim, we, the jury find, based on a preponderance of the evidence, that the defendant failed to provide plaintiff with a reasonably safe place to work, and that such failure caused, either in whole or in part, plaintiff's injury.

Yes _____ No__X__

Thereupon, the jurors were polled individually, and each of them affirmed her or his verdict.

After the jurors were discharged and left the courtroom, the plaintiff, by counsel, then moved the Court to set aside the verdict on the grounds that it was unsupported by the evidence, the instructions granted and refused, and on the rulings of evidence.

The Court agreed to withhold its decision on the verdict, pending submission of written memoranda of counsel. Having received and considered these submissions, this Court denies plaintiff's motion and

adopts defendant's memorandum as the Court's opinion. The objections of both parties made during the trial, in the post-trial motion, and plaintiff's objection to this Order are noted and preserved for the reasons stated to the Court during the trial and in the post-trial submissions of the parties.

It is, therefore, ORDERED that the jury verdict in favor of Norfolk and Western Railway Company be entered, and this cause be stricken from the docket and placed among ended matters.

The Clerk shall furnish certified copies of this Order to counsel of record.

Entered at Roanoke, Virginia this 30th day of April, 1996.

Robert P. Doherty, Jr., Jr.

JURY VERDICT

THE COURT: It has just been announced that the jury is ready, and the jury has come into the courtroom and I have been handed the special verdict form.

Ladies and Gentlemen of the Jury, if you will listen to me as I read this out.

Special Verdict Form Number one: In regard to Plaintiff's Safety Appliance Act claim, we, the Jury, find, based on a preponderance of the evidence, that the Defendant violated the Safety Appliance Act, and that such violation caused, in whole or in part, plaintiff's injury. And you have checked "no."

Is that your verdict on that one?

THE JURY: (Indicating in the affirmative)

THE COURT: And then the instruction to go on to Question Number Two if the answer to Number One was "no".

Question Number Two reads: In regard to plaintiff's FELA claim, we, the jury, find, based on a preponderance of the evidence, that the defendant failed to provide plaintiff with a reasonably safe place to work and that such failure caused, either in whole or in part, plaintiff's injury. And the response to that one is "no."

Is that your verdict?

THE JURY: (Indicating in the affirmative).

THE COURT: And that meant nothing else needed to be filled out. And signed by the foreperson dated 9-1-95.

Is there any request to poll the jury?

MR. MOODY: Yes, Your Honor.

THE COURT: I guess, on the two verdicts, finding of no, is that you decision on it? Yes or no?

(The Court asked each juror individually "Is that your decision?" Each Juror indicated in the affirmative.) (34 -35 Trans. Sept. 1)

VIRGINIA: IN THE CIRCUIT COURT OF
ROANOKE
FREDERICK L. MASTAW
v.
NORFOLK & WESTERN RAILWAY COMPANY

POST TRIAL MOTION BY MASTAW

THE COURT: Are there any motions?

MR. MOODY: Yes, Your Honor. The plaintiff moves to set aside the verdict and grant a new

trial on a number of grounds, one being the instructions granted and refused, one being on rulings on evidence, and, as I think I said, as contrary to law and the evidence.

And I would like an opportunity to have the record printed up and --

THE COURT: You want to make a written?

MR. MOODY: -- file a written motion.

THE COURT: I will withhold a decision on the verdict in this case and give you an opportunity to make your written motions.

MR. MOODY: Thank you. (36, 37 Trans. Sept. 1)

VIRGINIA: IN THE CIRCUIT COURT OF
ROANOKE
FREDERICK L. MASTAW
v.
NORFOLK & WESTERN RAILWAY COMPANY

MOTION FOR A NEW TRIAL

Frederick L. Mastaw, by counsel, moves this court to set aside the verdict rendered by the jury on September 1, 1995 and to order a new trial. The grounds supporting this motion are as follows:

1. The Court erred in admitting into evidence "cautionary rules" from Norfolk Southern's Operating Rules.

2. The Court erred in failing to instruct the jury that the defendant had violated the Federal Safety Appliance Act as a matter of law.

3. The jury's finding that the defendant did not violate the Federal Safety Appliance Act was contrary to the law and the evidence in this case and was without evidence to support it.

WHEREFORE, for the reasons stated above and more fully discussed in the Memorandum in Support of Motion for a New Trial submitted herewith, Frederick L. Mastaw respectfully requests this Court to set aside the verdict rendered by the jury on September 1,1995 and to order a new trial.

Respectfully Submitted,

Frederick L. Mastaw

ERROR ASSIGNED IN PETITION TO APPEAL TO SUPREME COURT OF VIRGINIA

1. The court erred in not instructing the jury that Norfolk & Western violated the Safety Appliance Act as a matter of law.

2. The Court erred in not granting Instruction 40 which was initially marked given and later marked refused by the Court since Instruction 40 was a proper statement of law under the evidence.

QUESTIONS PRESENTED TO THE SUPREME COURT OF VIRGINIA IN PETITION FOR APPEAL

1. Did the evidence show that Norfolk & Western violated the Safety Appliance Act as a matter of law (See Assignment of Error 1 and 2)

PRETRIAL HEARING BY TRIAL COURT
AUGUST 28, 1995 BEFORE
JUDGE DOHERTY, JUDGE CIRCUIT COURT
OF ROANOKE DISCUSSING ISSUES
ABOUT THE SAFETY APPLIANCE ACT

Two issues -- I had them marked down as two. The more I read them, the closer they ran together. But there was a motion to exclude the claim based on the Safety Appliance Act. The notes that I took said as it applies to the power brakes.

The argument was that the train stopped until the air line was repaired and that there is a twofold argument: One, that the power brakes worked properly; and two, that there was no evidence as to what caused the break in the air line in order to get this within the Safety Appliance Act.

I do appreciate with some of these issues the fact that you all cited all the cases that you did. As a matter of fact, I had read what I thought was sufficient number of the cases and skipped several of them because I couldn't find them. Then I accidentally found one of them toward the end, having already

written a little opinion as to the answer to that, read that case, got me under another line and I realized I was totally wrong.

So the answer to your question -- and I've written this one down. The case of Grogg versus Missouri Pacific Railroad Company at 841 F.2d out of the 8th circuit in 1988 was instructive on the issue of whether a Safety Appliance Act violation occurred in this case.

The plaintiff can come under the reasoning of the Safety Appliance Act if he shows that equipment was in violation of the Safety Appliance Act by demonstrating -- and both of you quoted portions of this same case -- some particular defect, or the same inefficiency may abe established by showing a failure to function when operated with due care in the normal and natural manner.

So that in effect there's a two-pronged test: One, if you can show what caused the defect; or two, you can show the defect if you can simply show that

the part failed to operate in the normal and natural manner when operated with due care.

Although we haven't had evidence and I just have representation of counsel, I doubt that the defendant's going to argue that they didn't operate the railroad with due care.

Proof of an actual leak or visible defect is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the part failed to work efficiently and properly. The test in fact is the performance of the appliance.

That was Grogg quoting from Myers versus Reading Company, 331 U.S. 477, a 1947 case.

So accordingly, a motion for judgment does not lie at this juncture. Assuming the evidence is going to come out as you have represented it to me, then a jury issue at least appears to be anticipated. Despite all reason and common sense, this appears to be the law.

If this evidence comes out, the possibility exists for a directed verdict on the issue of liability based on

these cases. I'll certainly hear argument at the proper time.

In that same area -- and I'm not sure if this was one of the numbered motions -- directly connected to the Safety Appliance Act violation issue and the facts of this case is the case of Wilson versus Union Pacific Railroad Company at 56 F.3d 1226, 10th Circuit, 1995, which is the case that got me started on this.

One of you had it cited 10th Circuit, 1995, with the case number and I couldn't find it, and although I had read the other brief, it didn't dawn on me that I was looking at the same case. When I finally connected it with the proper cite I read that.

There the Court found that plaintiff's injury while returning from the repair of a Safety Appliance Act violation constituted an injury within the contemplation of the act.

If the proof in this case is sufficient to deduce that the brake failure of the defendant's train was a violation of the Safety Appliance Act, then I at that time would have no problem, assuming the evidence

comes out that way, finding a per se violation on the part of the defendant (emphasis added) for the plaintiff's injury based on the Wilson v. Union Pacific Railroad Company case and the cases surrounding it -- although there weren't a lot of cases cited in it once you get into it, you get one or two cases and you fall back onto several others -- which excludes all of the argument about zone of injury. All those cases dealing with the zone of injury based on the logic of the Wilson case and the others surrounding it exclude that. ... (pages 5-9 Pre-Trial Hearing, August 28th)

NORFOLK & WESTERN'S MOTION TO STRIKE MASTAW'S CLAIM UNDER SAFETY APPLIANCE ACT, ARGUMENT AND COURT'S RULING

Our final motion, Your Honor, would be just to strike the Plaintiff's claim under the Safety Appliance Act. We do not believe that the Plaintiff has shown any evidence of causation in this case. This case is being tried under Virginia evidentiary law, and the Crosswhite case makes it very explicit that in order to

have an injury, it has to be related to the defective equipment, and, in this case, Mr. Mastaw was walking up a hill, and if it had to do with any defective equipment, if, indeed, there was defective equipment, and we've got -- there are other cases that certainly support that.

The federal case is the Beimert case that we've argued in our brief; I think that is Beimert v. Burlington Northern, and that clearly indicates that a safety appliance violation is -- unless it -- unless the defective equipment is related to the individual's injury, then it does not create causation, and that was a case with a man -- there was a safety appliance violation and the man was directly repairing that, but de chose a risky manner to do that, and he was injured because of his choice of the risky way of repair that was found not to be enough to establish causation. Emig v. Erie Lackawanna, which is 350, Federal Sup. 986, again indicates the same thing, that the individual had found a defect, but that because that was not

specifically related to his injury, that is not enough to establish causation.

The plaintiff has argued previously about the Wilson case, where an individual was running and he stepped in a rut. We think that case is inapplicable because, in this case, the evidence has shown that the plaintiff in this case was not required to walk across that valley and up the hill. He chose to do that; he did not consider it to be unsafe as he was walking up there. He felt the pain, but certainly that was a choice; that is not a direct causation, whereas in the Wilson case, the man did not have a choice; that was part of his duty, and there was not a trestle involved. This was not a choice; that was the rules that specified at that point that he was the individual, and he had to walk that in that case.

In this case, whether or not he -- even if he was supposed to walk the train or not, he certainly had the option, as has been admitted, to call for other people to come there and assist him on that, so we do not feel that the plaintiff has made out a case of causation, even

if the jury were to decide that there was an effective break of the violation under the Safety Appliance Act, and we move to strike that as having no evidence of causation. (10 - 13 Aug. 31st, Vol. IV)

THE COURT: Mr. Moody? ...

Now, as far as the case, itself, we've gone through that, and I think that our evidence -- I mean, the Motion to strike the plaintiff's claim under the Safety Appliance Act, His Honor heard that, and I think our evidence has pretty much followed what we set forth in the briefs, which under Coray, Howard D. Coray v. Southern Pacific, which His Honor has cited previously, and Grogg v. Missouri Pacific, and the case of Rogers v. Missouri Pacific and the case of Steven Wilson v. Union Pacific, all of which reported the position that a person with a safety appliance defect is entitled to recover if he simply shows that it failed to operate in the usual and customary manner, and that the person was injured in the process of correcting that defect, or in the Wilson case, on the way back from having corrected the defect, and in other cases which

have been cited was in the process of carrying out the repair or was on the way to the repair, and even in the Coray case, I believe it was, the train went into sudden emergency and another vehicle ran into the rear of the train, and the Court held that that was sufficient cause to show that the action would not have happened, had it not been for the defective brakes, but, Your Honor --

THE COURT: What case was that one?

MR. MOODY: I think that it's the -- this case is --

THE COURT: That is the one with the --

MR. MOODY: This case is Coray, yes; this is the Coray v. Southern Pacific, Judge.

THE COURT: Coray was the one with the hand car that ran into the back of the train?

MR. MOODY: Yes, the defendant was looking into another direction at the time and ran into the rear of the train.

THE COURT: I have read all of the cases that you all have cited.

MR. MOODY: And I feel, Your Honor, our position is the same now as it was during the Court's reconsideration at that time, and we have put on all of the evidence on earnings, and I don't think that there is any question that we proved that there was a violation of the Safety Appliance Act, and that this was the cause of Mr. Mastaw having to proceed.

The fact that he had -- they say he had a choice. Well, that is a question for the jury. He said that he had no choice, and so I think that is an issue that the jury will have to decide, if that is submitted to the jury on that issue, because his position is that that was an absolute requirement of his employment, and that he would have been discharged had he failed to do that, and based on that argument that he selected something, a choice that he didn't have to make, is just simply not applicable under his testimony, and we would ask His Honor to overrule the defendant's Motion. (16 - 18 Aug. 31st, Vol. IV)

THE COURT: All right. ...

COUNSEL FOR NORFOLK & WESTERN: We disagree with Mr. Moody that there is no question that they have proved violation of the Safety Appliance Act. They may have put on enough evidence at this point to raise a question as to whether or not there is one, but that does not go to causation, and we do not think that they've shown any evidence that would connect the repair of that brake line to the fact that Mr. Mastaw's back began hurting when he was walking up a hill. ... (19, 20 Aug. 31st, Vol. IV)

THE COURT: Now, the last one, that dealing with whether or not this was a Safety Appliance Act violation or not, I will tell you, as I told you before, in order to make my initial ruling in this case, I sat down and read about 100 cases.

I read every case you all cited and all the materials that you had cited, and they've all run together in my mind. I cannot separate one from another, except the ones I specifically wrote down, and I have made notes, and my notes had centered on Grogg v. Missouri Pacific Railroad Company case and

the Wilson v. Union Pacific Railroad Company case, and I'm going to have to look at Crosswhite, Beimert, the Emig case, and the Rogers case in order to respond to that, and if you gentlemen have those in the Courtroom, I will look at them right now, and if you don't we probably ought to take a break and let me read those four cases. I recall the Grogg case and I recall the Wilson case and I recall the Coray case.

MR. MOODY: Your Honor, I have the Grogg case. I'm not sure if I have the Crosswhite case.

THE COURT: The Grogg case, I remember that one.

MOODY: Well, I was handling that to the Court. I have those other ones, too, Judge, Coray and Crane and all of them.

THE COURT: All right, the four that I need to look at are Crosswhite, Beimert, Emig, and Rogers. All right, I have Rogers. Let me look at Rogers, then, and if you don't have them in the

Courtroom, no harm done. I can step out and look them up.

MR. MOODY: You said Rogers, Grogg, and Crosswhite, and was there another one?

THE COURT: No, there is about six or eight cases that you cited. I remember about three of them, and I think now that I have got everything I need. I have got Rogers, Emig, Crosswhite, and Beimert; I have got all of the cases I need to read. I remember the others.

MR. MOODY: I will be glad to leave these with you, Judge; they are right in my hand.

THE COURT: Okay. Let's --

MR. MOODY: There is one other that was referred to, that is Yabrra, Y-A-B-R-R-A, Yabrra v. Burlington Northern.

THE COURT: You are getting me back into the same position that I was before. let me go through this real quick and see if I can . . . let's just go into recess for about 15 minutes and let me go back there and try to read these.

(A recess was taken. Following the recess, the parties returned to the Courtroom, and the following took place before the Court.)

THE COURT: I thank you for your help. I reread the cases, but I'm going to need some more. Let me tell you what I have again concluded in looking at these cases. I think I would like to hear from the defendant as to -- well, either side, I guess; I would like to hear from the defendant as to why Grogg and Wilson, how they apply in the light of Crosswhite, and from the defendant -- I mean from the plaintiff, in how Crosswhite applies in light of Grogg and Wilson. Those three cases -- well, Grogg and Wilson, seem to say to me things that are almost exactly contrary to the law in Crosswhite, and I'm going to take the phrase in Crosswhite and change it a little bit, because I think that is what Grogg and Wilson say.

If I were to take the Crosswhite language and change it, the change would be "An employee can recover for a violation of statutory duty to apply safety appliances," and in here they say "Such as a boiler

inspection act," but we are looking at the Safety Appliance Act, unless the failure to comply with statute is the proximate cause of the accident, as a result of his injury, and this case seems to be directly in conflict with Grogg and Wilson.

Does anybody want to speak to that? I mean, I would rather not flip a coin to come up with the answer here. I know I have got your copies of the cases. Do you want to take a few minutes to look at these cases?

MR. PRITTS: No, Your Honor, I can probably address that. The Crosswhite case -- well, in the Grogg case, when the train -- the Grogg case doesn't talk about causation; it talks about what you need to show to show that SAA defect, and in that case, the train, something happened to the train and the train stopped, and the conductor was thrown forward and hurt during the crossing process, but -- unless I'm mistaken, I think that is right.

Connie Grogg was the name of the conductor, and all that case does is talk about what you need to

show to get an SAA violation. We're not contesting that right now. We are saying, assuming that there was an SAA violation and that stopped the train, we are saying that the causation link is broken, that the Crosswhite case is s till good law, and the Crosswhite case says that even if there is a violation-created condition or situation in which the accident happens, there is no liability if the accident happens from other causes, and our contention is as a matter of law that there is no causable link that the accident happened from other causes, which, like in the Beimert case or --

THE COURT: Well, let's discuss that. I agree with what you've just said, and that is exactly the same thing that is said in the Beimert case, where they say if the plaintiff's negligence was the sole cause, and emphasizing the "sole", then the violation of the Safety Appliance Act would not have contributed in whole or in part to the injuries, and they submit to the jury to determine if that was the sole case, and if it was the sole cause, then you come to what you've

just said, that if it is the sole cause, then they can't also have another cause. Am I correct in that?

MR. PRITTS: You lost me there, Your Honor.

THE COURT: All right, the language in the case of the Beimert case, which is the one that dealt with the guy who was using the bar to repair the hand rail inside of the car in the yard --

MR. PRITTS: Right.

THE COURT: They say in here that if the plaintiff's negligence was the sole cause of this injury, then even if there was, then the violation of the Safety Appliance Act could not have contributed in whole or in part of the injury, because 100 percent of the cause was the plaintiff's negligence. There can't be any other percentage, then, that applies to that injury from the Safety Appliance Act. Is that your opinion as to what Crosswhite says also?

MR. PRITTS: I believe it does, Your Honor. I believe it says that if the -- if there is a safety act violation creating a condition or situation in

which the accident happened, there is no liability if the accident happens from other causes.

THE COURT: All right.

MR. PRITTS: Which is exactly what Crosswhite says, so Crosswhite is not overruled by Grogg. Grogg is on a different issue, and Wilson, you said the Wilson case, which speaks to the causation issue that is raised in Crosswhite is distinguishable because the Wilson case did not involve a trestle, but it did not involve an employee who had a choice on what to do and volunteered to do it in a manner that was more unsafe than he was required to do, such as in the Beimert and Neiman cases, and that is where we think that case is extinguishable, and that is why we don't think that there is a jury question on this issue.

THE COURT: All right, well, that was helpful, because that was the point that I was hung up on. I will state this as clearly as can be, so that if there is any question on whichever side is upset about my ruling on a appeal, there won't be much question for somebody to make the decision, and I have tried to

do that all the way through. I made a decision on this, and my reasons are set forth in this.

I initially -- let me say that everything that I'm going to say about the Safety Appliance Act and the FELA, each sentence will start off with "Notwithstanding the application of common sense," okay, because when I first read all of this, it didn't appear to me that there was any way in the world that the plaintiff was going to be able to connect anything up with the Safety Appliance Act; however, I find that Congress, in deciding these acts, has gone outside the normal logic that flies in legal reasoning, and I think that we have a jury issue on the point of whether or not the plaintiff was injured as a result of or whether or not the violation of the Safety Appliance Act played any part, even the slightest, in producing this injury, and again, I have got so many cases here, I went through and wrote down a few notes, and I circled the portions I wanted to refer to, and I will try to freelance it, and hopefully I won't go too far afield here, but basically, I think the case of Grogg v. Missouri Pacific

Company, 210, Eighth Circuit, 1988, and the case of Wilson v. Union Pacific Railroad Company, 1995, are controlling in this issue, and I think what we're looking at is if they can show that a violation of the Safety Appliance Act occurred and that that violation contributed in any part, no matter how small, to the injury sustained by the plaintiff, then they fall within the FELA, and we don't have to worry about contributory negligence or anything like that, and I think that there is two ways to show that they came within the Safety Appliance Act; one, if they could show a particular defect in the appliance or the braking system, and the other is if the brakes -- if the problem occurred because of the failure to function when operated with due care in the normal and natural manner, which happened in this, so -- and the test is the performance of the appliance, so in this case, the jury an certainly find that a safety act appliance being the brakes, was defective because it failed to function properly when operated in its normal and natural manner.

The jury can also find certainly, in light of the language of the Wilson case, that the conductor going back to the ten -- to the problem and to determine what the problem was and make it necessary to repair was injured because of the violation of the Safety Appliance Act, and if they can make that finding, then the Safety Appliance Act would have been some cause of the injury, so I overrule that Motion, and I understand you all object for the reasons stated in the cases cited. Any other reasons?

MR. HAGIE: I think that we have covered that pretty well, Your Honor. (27 - 36 Aug. 31st, Vol. IV)

COURT REFUSING TO GRANT INSTRUCTION 40

THE COURT: Each of you has a stack of instructions that were given -- I think we kind of went overboard on instructions -- and a stack of the ones that are denied.

All right. If you are both ready, I will state for the record that we spent about an hour and a half or

two hours yesterday, the lawyers going over the instructions themselves and then with the Court, and then we have spent two and a half hours this morning going over instructions and getting them retyped, and the changes, and I have 51 instructions to give, and I have A through M either denied or withdrawn.

What is ;the position of the plaintiff with regard to the instructions to be given and the instructions withdrawn? ... (3 Trans. Sept. 1)

COUNSEL FOR MASTAW: Excuse me, Judge, but before we get into that, could you look at one instruction for me and tell me if -- I didn't get it back there -- Number 40, and tell me if that is your ruling?

THE COURT: Number 40.

MR. PRITTS: No, that does not belong in there.

THE COURT: This was the one we weren't going to put in.

MR. MOODY: I thought it was removed, too.

THE COURT: I'm sorry, Yes, that should not be.

MR. MOODY: I would love to have it, but --

THE COURT: I appreciate your point it out.

MR. PRITTS: I do, too.

THE COURT: Forty I am going to exclude.

(27 - 28 Trans. Sept. 1)

INSTRUCTION 40 OFFERED BY MASTAW STATING THAT NORFOLK & WESTERN VIOLATED THE SAFETY APPLIANCE ACT AS A MATTER OF LAW AND REFUSED BY COURT OVER OBJECTION OF MASTAW

INSTRUCTION NO. 40

The Court instructs the jury that the defendant violated the Federal Safety Appliance Act as a matter of law. If you find from a preponderance of evidence that this violation contributed, in whole or in part, to cause the injuries to Frederick L. Mastaw, this was a

violation of the Federal Employers Liability Act, then you shall find your verdict for the plaintiff.

FILED
APR 11 1997
CLERK

No. 96-1474

In The Supreme Court Of The United States

OCTOBER TERM 1995

FREDERICK L. MASTAW,

Petitioner,

v.

NORFOLK & WESTERN RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

DID THE TRIAL COURT PROPERLY REFUSE TO INSTRUCT THE JURY THAT A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT HAD OCCURRED AS A MATTER OF LAW WHERE FACTUAL DISPUTES EXISTED AS TO WHY THE TRAIN STOPPAGE OCCURRED AND WHETHER THE BRAKES OPERATED EFFICIENTLY OR DEFECTIVELY?

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STATEMENT OF THE CASE

This case went to a jury which heard conflicting evidence and resolved all of plaintiff Frederick Mastaw's ("Mastaw") allegations in favor of the defendant Norfolk & Western Railway Company ("NW"). While Mastaw now asserts that NW's equipment was inefficient as a matter of law, the evidence plainly was to the contrary. The trial court correctly refused to instruct the jury that NW violated the Federal Safety Appliance Act (FSAA) as a matter of law. (T. 9/1 at 28.)[1] The Supreme Court of Virginia denied Mastaw's petition for appeal stating: "[T]he Court is of opinion there is no reversible error in the judgment complained of." (App. 1-2.)

Mastaw was a conductor for NW. On the day of the incident underlying this action he was working on a train bound for Roanoke from Crewe. Before leaving Crewe it is the conductor's duty to see to it that a brake line test is completed. (T. 8/30 at 87-88.) Mastaw testified that the test was done and no problem with the air brakes was detected. (Id.) The train, in fact, ran for several hours without any difficulty. When the air hose in question somehow failed, the braking system operated exactly as intended: it stopped the train. (T. 8/31 at 224-25.)

The train came to a halt with the locomotives and a few cars on the east of Possum Creek trestle and the

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[1]Because the plaintiff's petition for appeal was rejected by the Supreme Court of Virginia, no joint appendix was prepared. Reference to the Appendix attached to Mastaw's Petition for Writ of Certiorari will be made as (App. ___). Reference to the transcripts of the proceedings in the Circuit Court of the City of Roanoke, Virginia will be made as follows: T. (trial date) at ____.

remainder of the train situated on the trestle and extending westward beyond. Notably, Mastaw was not injured when the train stopped. After stoppage, Mastaw called the dispatcher to send a repair crew (T. 8/30 at 100) and then determined that he would "walk the train" to locate the problem car.[2]

The Possum Creek trestle was elevated over a wide plain. Mastaw could have sent Wills, a younger man, to do the check, or he could have decided, under the circumstances, that walking the train was unsafe. (T. 8/28 at 96-97.) Moreover, he could have used a road nearby to get to more manageable terrain, but he claimed he could not properly inspect the train that way. (T. 8/30 at 101-02.)

In fact, Mastaw testified that when he set out he did not think walking the train was dangerous under the circumstances (T. 8/30 at 95-56), notwithstanding his extensive history of back trouble. (T. 8/30 at 90.) Thus, he and Wills ventured out to locate the problem. Mastaw did not fall. However, while walking up the bank on the far side of the valley, he allegedly hurt his back. (T. 8/30 at 39.)

The train was stopped on the Possum Creek trestle for a total of one hour and five minutes. (T. 8/30 at 50.) A crew arrived from Lynchburg and promptly undertook repairs. They replaced an air hose. (T. 8/31 at 46-47.)

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[2]There was an NW rule in effect, Rule 102, which dealt with inspection of a train after a stoppage. The Rule plainly did not require Mastaw to walk the train when a stoppage occurred on a trestle or bridge. (T. 8/30 at 92.)

Mastaw repeatedly states in his petition that the hose was destroyed by NW. However, at the time the hose was replaced, no one was informed that it might be needed. Mastaw continued on his regular course of duty and did not report the alleged back ailment at the time. That night in Roanoke he notified a dispatcher. (T. 8/30 at 55.)

At trial, plaintiff offered no explanation of why the hose ruptured. Uncontradicted evidence revealed that a hose can be punctured from any number of causes including flying debris under the train, stray bullets or animal carcasses. (T. 8/31 at 223.) Mastaw opined that the problem was not even hose related, but rather that the train line had been broken near a pipe joint and that it required welding in order to be repaired. (T. 8/30 at 44-47.) He recounted seeing sparks flying from the repair crew's welding equipment. Defendant convincingly disproved this allegation by showing that there was no welding equipment present at the scene. (T. 8/31 at 44, 46-47.) The repair bill reflected merely the replacement of a hose. (T. 8/31 at 46-47.)

The jury was instructed at length (App. 41-42) on FELA issues as well as the FSAA claim. With respect to the FSAA allegations the jury was instructed, inter alia:

INSTRUCTION NO. 9

> The plaintiff also makes a Federal Safety Appliance Act claim in this case:
>
> You shall find your verdict for the plaintiff on his Federal Safety Appliance Act claim if he proved by the greater weight of the evidence:

(1) that defendant's train which went into an emergency stop over Possum Creek Bridge on August 28, 1991 had some particular defect in the brake line or that the brake line failed to function when operated with due care, in the normal, natural and usual manner; and

(2) that the specific defect or failure to function was a cause of the plaintiff's injuries.

If the plaintiff failed to prove either or both of the two elements above, then you shall find for the defendant on the Safety Appliance Act claim.

If you find your verdict for the plaintiff on the Safety Appliance Act claim, then you shall proceed to determine his damages according to the instructions the Court will give you in a moment. The negligence, if any, of the plaintiff does not bar him from recovering nor does it diminish his damages.

The jury returned the following verdict.

1. In regard to plaintiff's Safety Appliance Act, claim, we, the jury, find, based on a preponderance of the

evidence, that the defendant violated the Safety Appliance Act, and that such violation caused, in whole or in part, plaintiff's injury.

Yes ___ No _x_

2. In regard to plaintiff's FELA claim, we, the jury find, based on a preponderance of the evidence, that the defendant failed to provide plaintiff with a reasonably safe place to work, and that such failure caused, either in whole or in part, plaintiff's injury.

Yes ___ No _x_

(App. 13-14.)

REASONS FOR DENYING THE WRIT

The questions presented by the Petition for Certiorari do not warrant review by this Court.

The central factual dispute concerned the cause of the emergency stoppage. At trial Mastaw asserted that a metal brake line had broken which mechanics had to weld in place. (T. 8/30 at 44-47, 110-11.) This factual claim was overwhelmingly rebutted. (T. 8/31 at 44, 46-47.) NW provided convincing evidence that the failure of an air hose was the reason for the emergency stop and that outside forces such as bullets, or animal carcasses -- wholly beyond

NW's control -- could have caused the failure. (T. 8/31 at 223.) The jury was left to resolve whether the brakes were efficient or whether a violation of the FSAA occurred. The jury properly and reasonably ruled for NW under the facts of this case.

Mastaw misreads a series of FSAA cases in which plaintiff's verdicts were overturned by trial judges who ruled, as a matter of law, for the employer. The lesson of those cases is that a jury issue is presented where evidence is disputed as to the existence of an alleged violation of the FSAA. When that lesson is applied to this case, the fact-finder's ruling for NW below must be upheld, and Mastaw's Petition for Writ of Certiorari denied.

I. THE TRIAL COURT PROPERLY SENT THE FACTUAL DISPUTE REGARDING THE ALLEGED FSAA VIOLATION TO THE JURY.

It was entirely proper for the trial court to refuse to give an instruction that, as a matter of law, NW violated the FSAA.[3] Federal case law which governs actions brought under the Federal Safety Appliance Act clearly indicates that the question of a violation was, at best, a jury

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[3] The FSAA and the Federal Railroad Administration regulations govern power air brakes and the procedures required to inspect air brake lines. Under the FSAA, as it existed in 1991, locomotive engines used in interstate commerce were required to have appliances for running power or train brakes and have a sufficient number of cars with power or train brakes so that the brakes could be controlled by the engineer. 45 U.S.C. §§ 1, 9.

The regulations setting forth the required testing of the air brake system are quite lengthy and include initial terminal road train air brake tests, 49 C.F.R. § 232.13, and running tests. 49 C.F.R. § 232.16.

issue -- a question on which the jury found in favor of NW.

Numerous decisions from this Court and others confirm that a jury question is presented when there is a dispute as to the defective or inefficient nature of railroad equipment. In Myers v. Reading Co., 331 U.S. 477, 484 (1947), a hand brake failed to function when engaged by the plaintiff. The jury reached the factual conclusion that the brake was not "an efficient brake." 331 U.S. at 481. The trial court overturned that ruling as a matter of law. While there was a dearth of testimony describing any "precise mechanical defects in the structure of the brake," 331 U.S. at 484, there was sufficient evidence from which the jury might infer that the brake was defective or inefficient. The Court, therefore, overturned the trial court's judgment and reinstated the jury's verdict:

> The questions at issue were questions of fact. The jury was entitled to draw inferences from the evidence. From the evidence presented, the jury reasonably could find, as it did in its special verdict, (1) that the brake was not an efficient brake, and (2) that the fact that the brake was not an efficient brake contributed to or caused injury to the petitioner. In the face of this, the trial court erred in entering a judgment for the respondent in accordance with the motion for a directed verdict.

331 U.S. at 476-77. By contrast, here, the jury resolved factual disputes for the defendant. Its verdict on the contested factual matters, similarly, must stand.

In Grogg v. Missouri Pacific Railroad Co., 841 F.2d 210 (8th Cir. 1988), the plaintiff brought an FSAA claim alleging she was injured when the train on which she was the engineer went into an emergency stop. Her evidence was that the train braked unexpectedly when an air hose failed to remain attached to its train car. The head brakemen testified that the air hose "had been busted.... It had been torn completely off the car." Id. at 213. No one knew the cause of the air hose failure.

The Court held that the trial court erred when directing a verdict for the railroad, but said a jury question was created:

> These facts would allow the jury to find that the air hose failed to function "in the normal, natural and usual manner" because it separated from the car at a time when it should not have done so. * * * Missouri Pacific's theories concerning more remote causes of the hose failure are theories the jury could choose to believe or not, and viewing the evidence as we must in Grogg's favor, these theories are more appropriately presented in closing argument.

Id. (Emphasis added; citations omitted.) The Grogg Court, consistent with this Court's ruling in Myers, ruled that the issue was a jury question. See also Metcalfe v. Atchison, Topeka, and Santa Fe Ry. Co., 491 F.2d 892, 897 (10th Cir. 1974) (holding jury question existed with respect to misaligned drawbar); New York, New Haven & Hartford Railroad Co. v. Leary, 204 F.2d 461, 465 (1st Cir.), cert. denied, 346 U.S. 856 (1953) (evidence of defect sufficient to submit violation of FSAA to the jury).

Petitioner's suggestion that the Supreme Court of Virginia is somehow confused or inconsistent in its application of the FSAA is mistaken. In N&W Ry. Co. v. Keatley, 211 Va. 507, 178 S.E.2d 516 (1971), Virginia's highest court observed: "Unlike the Employers' Liability Act, which imposes liability for negligence, the Safety Appliance Act imposes absolute liability upon proof of defective or inefficient safety equipment." 211 Va. at 509, 178 S.E.2d at 517. The Court went on to state that, under the facts of Keatley, the question of whether the railroad violated the FSAA was properly submitted to the jury. 211 Va. at 510, 178 S.E.2d at 518. The Supreme Court of Virginia's rejection of Mastaw's petition in this case is entirely consistent with the outcome in Keatley and with this Court's prior precedent: where there exists a dispute as to the efficiency or defectiveness of equipment, the jury is the final arbiter of whether the Act was violated. Here, such a dispute plainly existed.

Mastaw misapplies a series of FSAA cases in which plaintiffs' verdicts were overturned by trial judges who disregarded jury verdicts and ruled, as a matter of law, for the employer. The lesson of these cases is that a jury issue generally exists where evidence is disputed as to alleged violations of the FSAA. When that lesson is applied to this case, the fact-finder's ruling for NW below must be upheld, and Mastaw's petition for writ of certiorari rejected. The cases do not stand for the proposition advocated by Mastaw -- that every unplanned brake stoppage correlates, automatically, into a violation of the FSAA.

For example, in Coray v. Southern Pacific Co., 335 U.S. 520 (1949), the brake locked when air escaped from a valve that was so badly worn that a nut became disconnected. 335 U.S. at 521. This Court held: "In this

case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliances, petitioner was entitled to recover if this defective equipment was the sole or a contributing proximate cause of the decedent employee's death." 335 U.S. at 523 (emphasis added). The Court further stated: "These air brakes were defective; for this reason alone the train suddenly and expectedly stopped. . ." 335 U.S. at 524. Thus, in Coray there was no factual dispute as to the FSAA violation and no jury question was presented.

Similarly, in O'Donnell v. Elgin, Joliet & E.R. Co., 338 U.S. 384 (1950), there was uncontradicted testimony that there was a fracture of a coupler indicating an old defect. 338 U.S. at 393. While the Court admonished that the railroad's liability under the FSAA was unaffected by negligence or diligence issues, it further stated:

> We do not say that a railroad may never effectively defend under the Act by showing that an adequate coupler failed to hold because it was broken or released through intervening and independent causes other than its inadequacy or defectiveness; such, for example, as the work of a saboteur.

338 U.S. at 394 n.7. See also Norfolk and Western Ry. Co. v. Hiles, 116 S. Ct. 890 (1996) (railroad not liable as a matter of law under FSAA for injuries suffered by railroad employee while trying to straighten misaligned drawbar).

This case featured a dearth of evidence explaining the alleged inefficiency of the brake in question. The brakes had been checked the morning of the incident and had operated flawlessly until arrival at the Possum Creek

trestle. Mastaw argued that a metal train line broke and required welding. (T. 8/30 at 110-11.) NW countered with overwhelming evidence that this was untrue. (T. 8/31 at 44, 46-47.) Evidence suggested that a hose ruptured, and a likely cause of this problem was flying debris or stray gunshots. (T. 8/31 at 223.)[4] The jury was called upon to resolve the factual dispute and to determine whether the airbrakes were efficient. While the jury was free, based upon the stoppage, to infer a violation, it was not required to do so in the wake of conflicting evidence.

Just as an automotive windshield that fractures (rather than shatters) when struck by a large rock is not defective, the jury here was entitled to find that the braking system was neither defective nor inefficient when activated by outside forces. The FSAA should not be read to make every emergency activation of the braking system -- caused

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[4]At page 8 of his Petition, Mastaw now alleges that his co-worker, Wills, stated that the metal portion of the hose had cracked. On cross-examination, Wills conceded as follows:

> Do you remember as you sit here today what was causing that air hose to let off air?
>
> A I can't exactly remember where it was broke. It may have been from the statement or -- I just can't pinpoint exactly what it was.
>
> Q Today as you sit here you don't know what was wrong with that hose.
>
> A I know it had a leak. Now, where the leak was coming from, I don't know. I couldn't say.

(T. 8/29 at 100, see also T. 8/29 at 102.)

by gunshots, earthquakes, or saboteurs -- an automatic violation of the FSAA.

Moreover, here, Mastaw's alleged injury was quite remote from the brake stoppage. Knowing of his lengthy history of back problems (T. 8/30 at 90), Mastaw chose to walk hilly terrain which he was not required to do. (T. 8/28 at 97.) In fact, he did not fall, but claims to have hurt his back merely by walking up the incline. (T. 8/30 at 39.) Manifestly, the jury reached the correct verdict in finding that the FSAA had not been violated and that any such violation would not be a proximate cause of his injuries. (App. 13-14.)

Indeed, under the facts of this case the jury easily could have returned a verdict for NW merely by determining that plaintiff's decision to traverse the area under the trestle was the sole cause of his alleged injuries. Emig v. Erie Lackawanna Ry. Co., 350 F. Supp. 986, 987 (W.D. Pa. 1972), aff'd, 485 F.2d 679 (1973):

> Even under the Safety Appliance Act, where the defect in a particular appliance is negligence per se, the fact that an employee chooses a dangerous or risky manner in which to remedy the defect and consequently suffer [sic] injury does not impose liability on the employer.

Id. at 988; Beimert v. Burlington Northern, Inc., 726 F.2d 412, 414 (8th Cir.), cert. denied, 467 U.S. 1216 (1984).

This case does not warrant further review.

CONCLUSION

This case involves application of long-settled principles to peculiar facts. A jury question was presented as to the existence of a violation of the FSAA. The jury's verdict should not be disturbed.

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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